[PRIVY COUNCIL.]

PYE AND OTHERS . . . . . APPELLANTS ;
RESPONDENTS,

AND

MINISTER FOR LANDS (N.S.W.) . . . RESPONDENT.
APPELLANT,

ON APPEAL FROM THE HIGH COURT OF AUSTRALIA.

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1954.
July 1, 5-8, 12-14 ;
Nov. 4.
Lords Porter, Oaksey, Reid, Tucker and Asquith of Bishopstone.

Resumption—Closer settlement—Compensation—Assessment—Valuation—Advisory board—Land and Valuation Court—Value of land as at date fixed by statute—Figure arrived at—Owner—Acceptance or refusal—Right to elect—Exercise of right—Failure to give owner opportunity—Not mentioned in case stated—Appeal to court—Effect—Closer Settlement (Amendment) Act 1907-1950 *(N.S.W.) (No.* 12 *of* 1907—*No.* 27 *of* 1950), *ss.* 4 (1) (*b*), (4) (*a*) (*b*), 9—*War Service Land Settlement Act* 1941-1950 *(N.S.W.) (No.* 43 *of* 1941—*No.* 27 *of* 1950), *s.* 3.*

Statute—Construction—Words used—Interpretation—Filling in gaps—Power of court—Workability.

Where the Minister informs an advisory board under the *Closer Settlement (Amendment) Act* 1907-1950 (N.S.W.) that his intention is to resume land for closer settlement on behalf of those who have been engaged on war service, that body must make the valuation on the basis of the prices which prevailed on 10th February 1942, and before issuing its report must give the owner the opportunity of electing whether he will accept or refuse the figure determined.

A contention that the advisory board failed to give the owner an opportunity of electing whether he would accept or refuse the valuation figure determined did not form part of a case stated by the Land and Valuation Court.

Held, that, even if it did, the owner having proceeded to that court could not retain the right to contend that the option given by s. 4 (4) (*b*) (ii) of the *Closer Settlement (Amendment) Act* 1907-1950 (N.S.W.) was still open for the owner to exercise.

* The relevant provisions of these statutes are set forth in the judgment of their Lordships hereunder at pp. 638, 641 (post).

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The wording of the proviso to s. 4 (4) (*b*) gives no support to the contention that the value of the land to be resumed cannot be assessed until after the resumption is accomplished.

Decision by the High Court in *Minister for Lands (N.S.W.)* v. *Pye* (1953) 87 C.L.R. 469, affirmed.

APPEAL from the High Court to the Privy Council.

This was an appeal by special leave by the former owners of certain resumed land from the judgment of the High Court (*Minister for Lands (N.S.W.)* v. *Pye* (1)) allowing an appeal by the Minister for Lands from the decision of the Full Court of the Supreme Court of New South Wales (*Pye* v. *Minister for Lands* (2)) which had reversed a decision by *Sugerman* J.

The facts and relevant statutory provisions appear in the judgment of their Lordships.

Sir *Garfield Barwick* Q.C., *J. G. Le Quesne* and *J. E. Saywell*, for the appellants.

M. F. Hardie Q.C., *R. Else-Mitchell* and *Anthony Cripps*, for the respondent.

Their Lordships took time to consider the advice which they would tender to Her Majesty.

LORD PORTER delivered the judgment of their Lordships as follows :—

This is an appeal by special leave from an order of the High Court of Australia allowing three appeals (consolidated by order of the High Court) by the Minister for Lands of the State of New South Wales from orders of the Full Court of the Supreme Court of New South Wales and answering in a contrary sense to the Supreme Court certain questions of law in cases stated by the Land and Valuation Court of New South Wales (*Sugerman* J.) dated 28th May 1952.

The question involved is the proper measure of compensation to be paid in respect of the resumption (i.e. compulsory acquisition) of land in New South Wales, which was formerly the freehold property of the appellants, but was resumed by the Governor of New South Wales on 1st September 1950 under the provisions of the *Closer Settlement (Amendment) Act* 1907, as amended by subsequent Acts.

(1) (1953) 87 C.L.R. 469.

(2) (1952) 69 W.N. (N.S.W.) 291.

Before that date the appellants were the respective owners in fee simple of three parcels of land in New South Wales which were worked together as one estate known as Ghoolendaadi and it is this estate which (except for an area of less than one-tenth of the whole) was resumed under the Act of 1907.

The substantial question for their Lordships' decision is to determine whether the compensation payable to the owners on the compulsory acquisition of their land is to be based upon its value in February 1942, or on its current value on or about the date of resumption. Admittedly the current value very greatly exceeds the value in February 1942.

In the Land and Valuation Court, *Sugerman* J. held that upon the true construction of the relevant legislation the value of the resumed land must be determined, not as at 1st September 1950, which was the date of the resumption, but as at 10th February 1942. The appellants appealed to the Supreme Court by way of case stated, and the decision of *Sugerman* J. was reversed (1).

The Minister for Lands, being dissatisfied with this decision, appealed to the High Court which in its turn reversed the decision of the Supreme Court and restored that of *Sugerman* J.

The resumption was effected under the provisions of the *Closer Settlement (Amendment) Act* 1907 which has been many times amended. That Act may be referred to as the 1907 Act. Section 4 (4) makes provision as to the compensation payable in respect of resumptions under the Act. The decision of the present appeals therefore depends upon the true construction of that section in conjunction with the other provisions of the Act. In particular it depends upon the construction of a proviso which was inserted by the Act No. 48 of 1948 and amended by the Act No. 14 of 1950.

Before they deal with the construction of the Act however their Lordships think it essential to recount the sequence of certain changes in it and the reasons for which they were made but do not think it necessary to set out all the amendments. That task has been fully and accurately performed by the Supreme Court and need not be repeated.

The first Act of 1904 is still referred to as the Principal Act and provided authority to the Governor on taking the prescribed steps either to purchase or to resume land privately owned, i.e. to acquire land for closer settlement.

The relevant terms of that Act as amended will require to be set out at a later period but for the moment their Lordships, in order to clarify the position, need only mention in passing that

(1) (1952) 69 W.N. (N.S.W.) 291.

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in 1941 the legislature passed a *War Service Land Settlement Act* which by s. 3 empowered the Minister, by notification published in the *Gazette*, to set apart any area of land acquired under the *Closer Settlement Acts* as amended by subsequent Acts to be disposed of exclusively to any one or more of the following classes of persons :— (*a*) members of the forces ; (*b*) discharged members of the forces ; (*c*) discharged soldiers ; (*d*) other eligible persons.

In their Lordships' view it is not necessary to deal with the form of the provisions of the *Closer Settlement Acts* in their earlier stages, but in order to explain the course taken by the New South Wales Government, the relevant provisions in force up to the amending Act of 1946 have been conveniently assembled in a document provided for their Lordships' use and at the date in question contained the following provisions :—

" 2. (1) The Governor may, for the purposes of this Act, constitute three boards to be called Closer Settlement Advisory Boards, and may dissolve and reconstitute any such board. Any such board is hereinafter in this Act referred to as an ' Advisory Board.'

3. (1) Every such board shall, at the request of the Minister and within such time or extended time as he may appoint, report to him as follows :—(*a*) whether any, and if so what, land within an area to be specified by the Minister is suitable to be acquired for closer settlement ; (*b*) the estimated value of such land ; (*c*) the price at which the board recommends the acquisition of the land, and the method of arriving at such price ; (*f*) on any matter as to which the Minister requires a report.

4. (1) Where an advisory board reports that any land is suitable to be acquired for closer settlement, the Governor may—(*a*) subject to this Act, purchase it by agreement with the owner, or, (*b*) resume it under this Act.

(2) Every purchase or resumption shall be subject to approval by resolutions of both Houses of Parliament.

(3) Before resuming any land, the Governor shall, by proclamation in the Gazette, notify that he proposes to consider the advisableness of acquiring such land for the purposes of closer settlement.

7. (1) The resumption of land under this Act shall be effected by notification in the Gazette. On such notification being made, the land shall, subject to the right of retainer hereinafter provided, vest in His Majesty for the purposes of the Closer Settlement Acts and be dealt with thereunder.

9. (1) Where any land is resumed under this Act, any person interested in such land who is dissatisfied with the value of the land as assessed by the advisory board may appeal to the Land and

Valuation Court against such assessment in accordance with rules of court of that Court.

(2) Notice of appeal shall be lodged within twenty-eight days after the date of publication in the Gazette of the notification of resumption or within such further time as the Land and Valuation Court may, either generally or in any particular case, allow.

10. The Land and Valuation Court shall have jurisdiction to hear and determine the appeal".

There does not appear to have been any express provision in the Act then in force providing the amount to be paid as compensation to the owner of resumed land, though in s. 5 which is concerned with land the value of which is to be increased by the construction of public works, there is a sub-sub-s. 5 (7) (e) enacting "compensation to be paid on any such resumption shall unless an agreement is entered into under s. 11 of this Act be the value of the land as assessed by the advisory board or as determined by the Land and Valuation Court on Appeal" and s. 11 gave the Governor power notwithstanding the resumption of any land and any proceedings consequent thereon at any time to agree with the owner as to the price to be paid for the land. But no doubt the intention was that in other cases the price recommended by the advisory board should be adopted.

Under this scheme no difficulty in carrying out its provisions arose. The value as fixed by the board or, in case of an appeal, that fixed by the Land and Valuation Court would be the compensation payable unless an agreement with the owner was reached.

The necessary steps preceding resumption would then be: (1) the Minister's request to the board to report; (2) the report; (3) proclamation in the *Gazette* by the Governor that he proposes to consider the advisableness of acquiring the land for closer settlement; (4) resumption; (5) approval by resolution of both Houses of Parliament; (6) notification of resumption in the *Gazette*.

On 5th October 1945 whilst this scheme was still in force there was published in the New South Wales Government *Gazette*, No. 102 of that date, a proclamation by the Governor of his intention to consider the advisableness of acquiring the appellants' estates for closer settlement under s. 4 of the *Closer Settlement (Amendment) Act* 1907, and on 8th November 1945 before any further steps were taken the Commonwealth purported to enter into an agreement with the State to provide for the settlement of ex-servicemen and other eligible persons and to bear a portion of the expense. Under the scheme so made the State was to resume land for such closer settlement—the actual provision so far as is relevant is

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contained in cl. 11 (1) (b) of the scheme and was in the following terms :—" The State shall acquire compulsorily or by agreement and at a value not exceeding that ruling on the tenth day of February, one thousand nine hundred and forty-two, private land or lands held under lease from the Crown comprised in an approved plan of settlement ".

This agreement was approved and ratified by the Government of New South Wales by the *War Service Land Settlement Agreement Act* 1945 passed on 7th January 1946.

Act No. 14 of 1946 of which the short title was *War Service Land Settlement and Closer Settlement (Amendment) Act* was then enacted by which certain additions and amendments were made to the *Closer Settlement Act*. Those material to the present dispute were in the following terms :—" 4 (4) (b) The compensation to be paid in respect of any such resumption shall . . . be the value of the land as assessed by an advisory board, or where an appeal has been made in terms of s. 9 of this Act, as determined by the Land and Valuation Court : Provided that where any such resumption is made for the purposes of the scheme contained in the agreement approved and ratified by the *War Service Land Settlement Agreement Act*, 1945, the value of the land as so assessed or determined shall not exceed the value which would have been so assessed or determined in respect of an identical resumption as at the tenth day of February one thousand nine hundred and forty-two, excepting the value of any improvements effected on such land since that date ". In 1948 further amendments were made by inserting a provision under par. 4 (4) (*a*) of the 1946 Act permitting the price, in case of purchase, to be increased to a sum not exceeding fifteen per cent over the price recommended by the advisory board and in case of resumption to be increased to a like extent provided the owner agreed not to claim compensation in excess of the value of the land as assessed by the board but not otherwise.

In the present case no report had been made to the Minister before the decision in the High Court of the case of *P. J. Magennis Pty. Ltd.* v. *The Commonwealth* (1) in which it was held that the provisions in the agreement between the Commonwealth and the State providing for the assessment of compensation for resumed property on the basis of 1942 values was contrary to the " just terms " provision of the Commonwealth Constitution and that the agreement was ultra vires the Commonwealth ; that there was

(1) (1949) 80 C.L.R. 382.

accordingly no valid agreement on which the *War Service Land Settlement and Closer Settlement (Amendment) Act* No. 14 of 1946 could operate and that the State Act was to that extent ineffective.

The *War Service Land Settlement Agreement Act* was then repealed by the *War Service Land Settlement and Closer Settlement Validation Act* 1950 which was by s. 1 (2) to be read and construed with the *War Service Land Settlement Act* 1941 and the *Closer Settlement Acts* and was to be deemed to have commenced on 7th January 1946. The substantial result of these changes was to throw back the State upon its own Act of 1941, and to strike out all reference to and dependence upon the agreement with the Commonwealth.

The result was that, so far as is material s. 4 of the Act of 1907 took the following form :—

"4.—(1) Where an Advisory Board reports that any land is suitable to be acquired for closer settlement, the Governor may— . . . (*b*) resume it under this Act.

(2) Every . . . resumption shall be subject to approval by resolutions of both Houses of Parliament.

(3) Before resuming any land, the Governor shall, by proclamation in the *Gazette*, notify that he proposes to consider the advisableness of acquiring such land for the purposes of closer settlement.

(4) (a) The price to be paid in respect of any such purchase shall not exceed the price at which an advisory board has recommended the acquisition of the land : Provided that where any such purchase is made for the purpose of section three of the *War Service Land Settlement Act*, 1941, as amended by subsequent Acts, the price at which an advisory board recommends the acquisition of the land shall not exceed by more than fifteen per centum the price which it would have recommended in respect of an identical purchase as at the tenth day of February, one thousand nine hundred and forty-two, excepting the value of any improvements effected on such land since that date. (b) The compensation to be paid in respect of any such resumption shall, unless an agreement is entered into in terms of s. 11 of this Act, be the value of the land as assessed by an advisory board, or where an appeal has been made in terms of s. 9 of this Act, as determined by the Land and Valuation Court. Provided that where any such resumption is made for the purposes of s. 3 of the *War Service Land Settlement Act* 1941, as amended by subsequent Acts, the value of the land as so assessed or determined shall not exceed the value which would have been so assessed or determined in respect of an identical resumption as at the tenth day of February one thousand nine hundred and forty-two, except-

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ing the value of any improvements effected on such land since that date ".

A further change however was made by the *War Service Land Settlement and Closer Settlement (Amendment) Act* No. 48 of 1948, which amended s. 4 (4) (*b*) by striking out the proviso to that sub-sub-section and inserting in lieu thereof the following:— " (i) In the case of any such resumption where the owner has agreed not to claim compensation in excess of the value of the land as assessed by an advisory board the value of the land as so assessed shall not exceed by more than fifteen per centum the value which would have been so assessed or determined in respect of an identical resumption as at the tenth day of February one thousand nine hundred and forty-two, excepting the value of any improvements effected on such land since that date; (ii) In the case of any such resumption other than a resumption where the owner has agreed not to claim compensation in excess of the value of the land as assessed by an Advisory Board, the value of the land as so assessed or determined shall not exceed the value which would have been so assessed or determined in respect of an identical resumption as at the tenth day of February one thousand nine hundred and forty-two excepting the value of any improvements effected on such land since that date ".

The Act of 1950 received the Royal Assent on 3rd May 1950. Up to this time the advisory board seems to have made some attempts to come to terms with the appellants and also to have held their hand pending a settlement of the legal position, but on 4th May of that year they valued the lands, subject to an agreed retention of 3,631 acres by Richard Anthony Pye on a freehold basis inclusive of improvements, in accordance with sub-s. 4 (*b*) (ii) of the *Closer Settlement (Amendment) Act* 1907 as amended, as at 10th February 1942, and recommended their resumption accordingly.

Thereupon on 1st September 1950 there was published in the New South Wales Government *Gazette* a declaration by the Governor that the lands in question were resumed, and that (as the fact was) both Houses of the Parliament of New South Wales had approved of the resumption of these lands.

On 28th September 1950 the appellants lodged notices of appeal to the Land and Valuation Court, against the assessments of value of the resumed land made by the Closer Settlement Advisory Board.

Each of those notices of appeal set out the grounds of appeal as follows:—

1. That the value of the land assessed by the Closer Settlement Advisory Board is too low.

2. That the advisory board arrived at the value of the land on an incorrect basis.

3. That the advisory board did not have proper regard to the items going to make up the value of the land in accordance with the relevant Act.

4. That the advisory board in arriving at the value of the land did not have proper regard to the productive capacity of the land.

At the hearing before the Land and Valuation Court certain evidence was sought to be given, viz.: (1) questions with the object of establishing the value of the land at the date of resumption and (2) questions for the purpose of showing that the appellants were not given an opportunity under s. 4 (4) (*b*) (ii) of agreeing not to claim compensation in excess of the value of the land as assessed by the advisory board.

Both these classes of evidence were rejected, the first upon the ground that only 1942 values could be considered and the second on the ground that under the terms of the proviso to s. 4 (4) (*b*) (ii) the owner was not entitled as of right to be given the option of agreeing not to claim compensation in excess of the valuation put upon his land by the advisory board though possibly he might be entitled to an increase limited to fifteen per cent if he claimed to exercise such an option.

Before *Sugerman* J., as indeed before the three courts in Australia and before their Lordships, the argument turned upon whether the statute in the present form was workable.

On behalf of the appellants Sir *Garfield Barwick* forcefully and analytically contended that it was unworkable. The prescribed sequence of events would not, it was said, permit a valuation based on 1942 values.

Substantially the argument ran in the following form (i) the Minister prescribes an area from which the advisory board may select all or any parts and, until they have done so, the land which will be resumed and its owner are both unknown. (ii) Two at least of the duties which the board must perform are to report the estimated value of the land and the price at which it recommends its acquisition and the method of arriving at such price. (iii) At that time the board cannot tell the purpose for which the Governor may resume the land except that it is for some form of closer settlement, nor can they tell what portion of the prescribed area will be resumed or who will be the owner affected. (iv) Prima facie their duty is to estimate the current value of the land and, until a notification is published in the *Gazette* under s. 7 (1) and that notification is declared under s. 4 (4) (*b*) to be for the purpose of s. 3 of the *War Service*

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Land Settlement Act 1941, there is no assurance that the resumption will be for the purpose of that Act and, indeed, even then the resumption is still subject to approval of both Houses of Parliament. (v) The board therefore, in ignorance of the purpose of the resumption and of what land will be chosen for war settlement or other closer settlement and accordingly ignorant of who the relevant owner may be, will have no means of deciding what land is to be valued at 1942 values or what owner is affected. (vi) How then until resumption has actually taken place is it possible to determine which land is to be valued at current and which at 1942 values. (vii) There is no provision in the Act for the estimation of value to be deferred or for a second valuation to be made. (viii) Moreover even if an owner could be ascertained, s. 4 (4) (*b*) (i) and (ii) contemplate an opportunity for the owner to agree before the report is made, whereas, having regard to the ignorance of the board as to the purpose of the resumption, no such opportunity is possible, nor in the particular instance was such an opportunity given.

In face of these arguments the learned judge put aside the problem as so presented and distinguished between the position of the board and that of the Land and Valuation Court. Let it be assumed, he said, that if the matter had stopped at the report of the board, the provisions of s. 4 (4) (*b*) (i) and (ii) are unworkable. But it has not stopped there. There has been an appeal to the Land and Valuation Court against the assessment and that court has jurisdiction to hear it—see s. 9 (1) and (2). The jurisdiction given to that court is called an appeal but it is in fact a rehearing at which evidence (if relevant) and argument can be presented. When the matter reaches that stage, the resumption has taken place, the owner is known and the purpose is conclusively evidenced by s. 4 (4) (*b*). The argument against workableness therefore falls to the ground and the court is not faced with any difficulty in applying the sections nor does any question of evidence arise inasmuch as the court is compelled to adopt 1942 values. Moreover, although the Government may give the owner the opportunity of agreeing not to appeal, it is not obliged to do so and in any case having appealed against the assessment he has thereby chosen not to accept the assessed value.

At the hearing in the Land and Valuation Court the judge was requested to state a case for the opinion of the Supreme Court upon a number of questions all directed to the basis upon which compensation is payable on the true construction of the Act of 1907. None of these questions dealt specifically with the contention that the owners should have been given an option under s. 4 (4) (*b*) to

elect to accept the value assessed by the board nor is such a contention to be found in the grounds of appeal but undoubtedly the question was raised and dealt with by the learned judge in annexure A to the case stated. He, however, was of opinion that the wording of s. 4 (4) (*b*) (ii) applied exactly to the case in issue, that under that sub-section, 1942 values plus an increase up to fifteen per cent of those values was the utmost that could be given and that in appealing to the court the owners were appealing on the basis that their case came under s. 4 (4) (*b*) (ii) and could only appeal on that basis.

The appellants appealed to the Supreme Court from the judgment of *Sugerman* J. in the case stated.

In that court the judgment was reversed but upon narrow grounds.

It is true that the Supreme Court accepted the argument that the board's assessment must take place prior to resumption and that the taking of 1942 values could only operate after a resumption had been made and made for a purpose which could not be known until a notification of resumption had been published in the *Gazette*. Accordingly they say :—" the proviso cannot apply to an advisory board when making an assessment and report, and that board's only duty is, therefore, to assess on the basis of the general law, namely, on the basis of the values current at the date of its report. . . . The proviso appears to have been drafted upon the erroneous assumption that the assessment of value by the board comes after, and not before, resumption, whereas the true position is that its only power is to assess before resumption . . . The appellants then submit that when an appeal is brought to the Land and Valuation Court after notification of resumption, that court must put itself in the same position as the board and do what it should have done, namely, fix a value on the basis of the values current at the date of the board's assessment " (1).

On the other hand they agree with *Sugerman* J. as to the duties of the Land and Valuation Court. Their words are :—" It is at this point that we find ourselves in disagreement with this line of argument. It is true that the matter reaches the Land and Valuation Court under the name of an ' appeal ' from the board's assessment, but what the Land and Valuation Court is required to do is to fix the compensation payable on a resumption which has by that time taken place. On this ' appeal ' the basis on which the advisory board at some earlier pre-resumption date assesses the value is irrelevant. The function of the court is to fix the amount payable

(1) (1952) 69 W.N. (N.S.W.), at p. 296.

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by way of compensation, and not to enquire whether the board, in making its assessment, went right or wrong. This was clearly the position under s. 9 of the 1907 Act in its original form. Though instituted in name by a 'notice of appeal', the right given to an owner who was dissatisfied with the board's valuation was to apply to have the 'fair market value of the land and improvements' determined by the court constituted under that Act. An appeal in the strict sense is an inquiry by the appellate court whether the order of the tribunal from which the appeal is brought was correct on the materials which that tribunal had before it. Under this legislation there is now no prior hearing in open court or at all and no record of what materials the board had before it except so far as may appear from its report. The Land and Valuation Court cannot even rehear the case, since there has been no prior hearing. Its duty is to inquire and determine for itself, regardless of the board's views as reported to the Minister, what is the true value for resumption purposes of the property in question, paying due attention to any statutory directions given in that regard and in the light of the facts then existing" (1).

So far the Supreme Court agree with *Sugerman* J. but they disagree with him in the result because in their view it is a condition precedent that the owner should be given an opportunity of electing whether he would accept the board's valuation or not. The board as they construe the section: (1) must give this opportunity before it enters on the task of assessing values; (2) must make its report before any resumption takes place and (3) the 1942 basis of valuation introduced by the proviso is applicable only after a resumption has been made and made for the purpose stated in the proviso.

Their view is perhaps most clearly expressed when they say:— "It is implicit in the legislative scheme that the owner should first be given an opportunity of deciding whether he will accept the valuation which the board is later to make, since it is not until the board knows whether or not the owner is prepared to accept its assessment as final and abandon his right of 'appeal' in exchange for the possibility of obtaining an additional fifteen per cent on the 1942 values, that it can know what standard of values it is to apply. Yet this condition precedent to the application of 1942 values cannot be fulfilled, because by the very terms of the Act in which the proviso appears the board must make its assessment before, and not after, resumption, and therefore before the purpose for which the resumption is made can be known" (2).

(1) (1952) 69 W.N. (N.S.W.), at p. 296.

(2) (1952) 69 W.N. (N.S.W.), at p. 297.

In support of this view the Supreme Court pointed out that s. 4 (4) (*b*) (i) and (ii) form part of a general scheme and must be read together and that under (ii) an owner has to be given an opportunity of agreeing to accept the compensation assessed by the advisory board, not that determined by the Land and Valuation Court. As they had already indicated in their opinion the values given by the advisory board must necessarily be exercised prior to resumption and until the board knew of the purpose of the resumption no such opportunity could be or was in fact given.

The grounds of this decision were, as their Lordships think, accurately expressed by the High Court in the words " The value to be stated in the report must be the value at the date of the report. The assessment of that value by the advisory board having necessarily been completed before the resumption, the proviso attempted to achieve an impossibility, when it purports after the resumption has been effected to give the advisory board a direction as to the manner in which it shall go about a task already performed " (1).

The Supreme Court accordingly held that " Some of the language used by Parliament is so intractable that it cannot be given any operative effect " (2) and answered question 2 of the stated case (A) No, (B) Yes, (C) No, i.e. that the compensation payable was the value at the date of resumption.

From this decision an appeal was taken to the High Court which allowed the appeal and held that compensation was payable on the values taken by the board, i.e. the values on 10th February 1942.

They resolved the difficulty posed by the Supreme Court by holding that the proviso is not in the nature of a command to the advisory board prescribing the basis upon which it shall perform its duty of valuation, but a notice to the board that unless it limited its assessment by reference to 1942 values the assessment would not be effective. Their words are :—" the solution which the draftsman adopted was to add a proviso to the sub-section which fixed the owner's compensation at the amount of the value as assessed by the advisory board, and to rely upon the practical effect which this would necessarily have upon the mind of the board when making its valuation. Thus the key to the problem was found in the fact that in actual practice the advisory board would be certain to know the purposes for which the resumption was likely to be made, and a proviso added to s. 4 (4) (b), while not a command obligatory upon the board when valuing, would nevertheless operate as notice to the board at that time that unless it

(1) (1953) 87 C.L.R., at p. 480.

(2) (1952) 69 W.N. (N.S.W.), at p. 298.

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limited its assessment by reference to the 1942 value, (or that value plus fifteen per centum if the owner had agreed not to appeal), the assessment would not be effective to determine the compensation in the event of the resumption being in fact made for the stated purposes " (1).

As to the alleged necessity of giving an opportunity to the owner they held that this provision was inserted for the benefit of the Crown so that if so minded it might offer an inducement to the owner to refrain from appealing. In their view it was an option which the Crown might or might not exercise and, if it did not, the owner had no ground of complaint.

From that judgment the appellants appeal to their Lordships' Board.

Their Lordships agree with the decision of *Sugerman* J. and of the High Court though they do not wholly adopt the grounds of their judgments.

That decision depends entirely upon the construction of the *Closer Settlement Act* as now amended and the Act in its present form must be read as a whole.

In approaching their decison their Lordships have borne in mind the warning contained in *Magor & St. Mellons Rural District Council* v. *Newport Corporation* (2), that the duty of the court is limited to interpreting the words used by the legislature and it has no power to fill in any gaps disclosed but in the meaning which they have put upon the Act as now framed their Lordships have refrained from adopting any such course and have confined themselves strictly to interpretation.

In reaching a conclusion as to the meaning to be placed upon an Act of Parliament it must always be remembered as Lord *Dunedin* stated in *Murray* v. *Inland Revenue Commissioners* (3), " It is our duty to make what we can of statutes, knowing that they are meant to be operative, and not inept, and nothing short of impossibility should in my judgment allow a judge to declare a statute unworkable " (4).

A similar view was expressed by Lord *Simon* in *Nokes* v. *Doncaster Amalgamated Collieries Ltd.* (5) in the words: " If the choice is between two interpretations the narrower of which would fail to achieve the manifest purpose of the legislation, we should avoid a construction which would reduce the legislation to futility and should rather accept the bolder construction based on the view

(1) (1953) 87 C.L.R., at pp. 483, 484.
(2) (1952) A.C. 189.
(3) (1918) A.C. 541.
(4) (1918) A.C., at p. 553.
(5) (1940) A.C. 1014.

that Parliament would legislate only for the purpose of bringing about an effective result" (1).

With these principles in mind their Lordships approach the interpretation of the statute which in the hearing before them has been elaborately analysed.

The gravamen of the charge that it is unworkable lies in two contentions already referred to, viz.: (1) that the compensation is to be determined by the advisory board in its report before the purpose of the resumption is finally determined by the Governor and confirmed by Parliament; and (2) the owner must be given an opportunity of electing to accept the value in the report or rejecting it and no such opportunity can be or has been given in the present case.

The second of these objections may in their Lordships' opinion be shortly dealt with. They agree that, where the Minister informs the advisory board that his intention is to resume the land for closer settlement on behalf of those who have been engaged on war service, that body must make the valuation on the basis of the prices which prevailed on 10th February 1942, and before issuing their report must give the owner the opportunity of electing whether he will accept or refuse the figure arrived at, but as has been already indicated in the present instance, a contention that they failed to do so forms no part of the case stated by the Land and Valuation Court, and even if it did, the appellants having proceeded to that court cannot now retain the right to contend that the option given by s. 4 (4) (*b*) (ii) is still open for them to exercise.

The first contention however has still be be considered. Technically it presents some difficulty but in practice no actual difficulty has been encountered.

In the present case the advisory board obviously knew of the intention of the minister and assessed the compensation accordingly and the requisite subsequent steps were taken in due course.

Except for the contention that the board were obliged to take current values no criticism of the procedure gives rise to complaint.

In their Lordships' view the argument that the board could not know the purpose of the resumption, until it had finally been effected, is not justified.

The Minister can have a purpose which he can intimate to the board so soon as he makes his request under s. 3 (1) of the Act. No doubt it is conceivable that he or the Governor might change their intention, but in such a case the proper course, if it were intended to resume the land for other closer settlement purposes,

(1) (1940) A.C., at p. 1022.

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would be to withdraw the original request and resubmit the matter to the advisory board.

It is true that the Minister prescribes the general area from which a choice of the land to be resumed is made, but the advisory board are the body by whom both the actual land to be resumed and its value are to be determined. They therefore (1) know when they are making their report the purpose for which the land is to be resumed and the owner; (2) can make their assessment of value on that basis and (3) can give the owner his option under s. 4 (4) (*b*) (ii).

The objection is theoretical only. In fact the advisory board do and in this case did know both the purpose of the resumption and the owners concerned.

But it is contended that the wording of the proviso to s. 4 (4) (*b*) " Provided that where any such resumption is made " shows that the 1942 value can only be applied after resumption has taken place, and it is urged that this expression should be read as equivalent to " where any such resumption has been made ".

In their Lordships' opinion no such meaning need be or should be ascribed to it.

The words, in their view, are descriptive of the purpose of resumption and have no temporal connotation. It is not " has been made ", although the High Court in one passage so transcribe it, nor is it " in course of being made " as the respondent appears at one time to have argued. The simplest and most accurate paraphrase to their Lordships' minds is to substitute the words " in a case where the resumption is made for the purposes of s. 3 of the *War Service Land Settlement Act* 1941 as amended ", i.e. it indicates the object for which the resumption is made, and does not mean that the value is not to be assessed until after resumption has taken place.

It follows that the wording of the proviso gives no support to the contention that the value of the land to be resumed cannot be assessed until after the resumption is accomplished.

Nor does any difficulty arise from the fact that the approbation of the Governor and of Parliament is required. The Minister represents the Government and the Governor acts as Governor in Council: there is consequently no dichotomy between the Minister who requires a report and the Governor who resumes. Parliament in its turn will be presented with a scheme for resumption for the purpose of the *War Service Land Settlement Act* 1941 and it will be for that body to approve or disapprove that scheme.

For these reasons their Lordships are of opinion that the case was rightly determined by the High Court. The grounds of their

decision leaves it unnecessary to pronounce upon the view held by *Sugerman* J.: (1) that, whatever the value assessed by the advisory board, it is the duty of the Land and Valuation Court to embark upon a fresh inquiry as to values in no way trammelled by the value assessed by the advisory board, or (2) that the facts known when an appeal is made entitles that court to adopt a different basis of valuation from that adopted by the board.

If that were the only ground on which a 1942 valuation could be supported, then, if the advisory board were under a duty or entitled to insert current values in their report, the owner who had been given the advantage of such a valuation might well avoid any appeal and in such a case it is difficult to envisage any course which the Government could take except under the power given by s. 6 (2) to cancel the proclamation made under s. 4 (3).

It will be observed that their Lordships have placed no reliance upon the provisions of s. 3 (1) (*f*) of the *Closer Settlement Act*. In their view that sub-section enables the Minister to request a report on matters additional to sub-ss. (*a*) to (*e*) but does not confer a power to omit or change the requirements of those sub-sections.

Nor do their Lordships think that on its true interpretation the Act provides for the making of two or more reports or for the alteration or amendment of one already made.

For the reasons which they have set out above however their Lordships are of opinion that the case has been rightly decided by the High Court and will humbly advise Her Majesty that the appeal be dismissed. The appellants must pay the costs incurred by the respondent before their Lordships' Board.

Solicitors for the appellants, *Dudley Westgarth & Co.* by *Waterhouse & Co.*

Solicitor for the respondent, *F. P. McRae*, Crown Solicitor for New South Wales, by *Light & Fulton*.

J. B.